

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400-N  
Washington, D.C. 20001-8002



Date Issued: March 30, 1999

Case No.: 1996-INA-0494

***In the Matter of:***

BARBARA CHAMBERS CHILDREN'S CENTER  
*Employer,*

***On Behalf of:***

NANAESI EWUSIWA OCRAN,  
*Alien.*

Certifying Officer: Richard Panati, Region III

Appearance: S. Anita Ryan

Before: Huddleston, Jarvis and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

An application was filed on January 2, 1996, by Barbara Chambers Children's Center, Employer, for the position of Preschool Teacher, seeking labor certification for Nanaesi Ewusiwa Ocran, Alien. The duties of the job were described as follows:

Nursery School Attendant-Organizes and leads activities of pre-kindergarten children in nursery school: helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting, and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May assist in such tasks as preparing food and cleaning quarters.

Employer required that applicants have a B.S. degree and three years of experience (AF 44).

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on July 10, 1996 (AF 38-41). The CO changed the occupational title and code of the petitioned job from Preschool Teacher to Nursery School Attendant on the basis of the job description contained in Employer's labor certification application. After stating that the position of Nursery School Attendant requires only 3 to 6 months of combined education training and experience, the CO reasoned that Employer's job requirements as stated in the application are unduly restrictive; that they exceed those defined in the Directory of Occupational Titles (DOT). (20 C.F.R. § 656.21(b)(2)) Employer was advised that it could rebut this finding by submitting evidence that the job requirements arise from a business necessity or by reducing the requirements to those normally required for the job and re-advertising.

Employer, by counsel, submitted rebuttal on July 25, 1996 (AF 33-37). The rebuttal consists of a letter from Employer and argument from Counsel. Employer's letter states that it wishes to hire a Teacher, not a Nursery School Attendant; that it is required by Federal regulations to hire Teachers with a minimum of 15 college credits; that it made an internal decision to require a college degree rather than just 15 college credits; that the job requirements are a business necessity, bear a reasonable relationship to the occupation and are essential to

---

<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

perform the job duties in a reasonable manner. Counsel argues that Employer does not want the job certified as a Nursery School Attendant because pursuant to Federal regulations it cannot hire anyone who does not have at least 15 college credits; that although the job description in the application describes duties similar to that of an Attendant; “it also contains the same information that is in the Code listing for Teacher.” (AF 34) Counsel argues further that Employer has shown a business necessity for the job requirements and that the position should be certified.

The CO issued a Final Determination denying certification on August 6, 1996. (AF 31-32) The CO compared the job duties stated in Employer’s labor certification application with the job duties stated in the DOT for a Nursery School Attendant<sup>2</sup> and found that they are identical. The CO also compared the job duties in Employer’s application with those of a Preschool Teacher<sup>3</sup> and found that they were different. The CO stated that the job duties define the position, not the title that an employer gives to the job. The CO determined that the job being offered by Employer, based on the job duties described in the labor certification application, is Nursery School Attendant, not Teacher.

The CO stated further that it is totally unclear how the Alien’s degree in Respiratory Therapy has any relevance to performing the duties of the offered job; that since there is no apparent connection between the Alien’s degree and the job duties, one must conclude that a degree is not really required, but has been listed simply to qualify the Alien and exclude U.S. applicants. The CO also noted that the Alien’s three years of qualifying experience was obtained prior to her graduation from high school in 1989. This being so, the CO reasoned that since the Alien was not required to have a college degree to obtain the qualifying experience, Employer has not demonstrated that a college degree is necessary to perform the job duties. The CO also stated that 15 college credits can be obtained in six months, which is the training period specified in the DOT for a Nursery School Attendant; that Employer’s internal decision to require a college degree rather than 15 college credits does not constitute a business necessity. The CO concluded that the job is properly coded as Nursery School Attendant based on the job duties described in the application; that Employer has not demonstrated a business necessity for the restrictive job requirements of a B.S. degree in an unspecified field and 3 years of experience.

---

<sup>2</sup> 359.677-018 NURSERY SCHOOL ATTENDANT (any industry) alternate titles: child-care leader; child-day-care center worker; day care worker

Organizes and leads activities of prekindergarten children in nursery schools or in playrooms operated for patrons of theaters, department stores, hotels, and similar organizations: Helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting, and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest periods. May assist in preparing food and cleaning quarters.

<sup>3</sup> 092.227-018 TEACHER, PRESCHOOL (education)

Instructs children in activities designed to promote social, physical, and intellectual growth needed for primary school in preschool, day care center, or other child development facility. Plans individual and group activities to stimulate growth in language, social, and motor skills, such as learning to listen to instructions, playing with others, and using play equipment. May be required to have certification from state. May be designated Teacher, Child Development Center (education); Teacher, Day Care Center (education); Teacher, Early Childhood Development (education); Teacher, Nursery School (education).

Employer, by counsel, requested administrative-judicial review on September 12, 1996. (AF 1-30)

### **DISCUSSION**

The issues are whether Employer's job offer contains unduly restrictive job requirements and if so, whether a business necessity for those requirements has been demonstrated.

Section 656.21(b)(2) proscribes an employer's use of unduly restrictive job requirements in the alien labor certification process, unless the requirements are adequately documented as arising from business necessity. The Board defined how an employer can document "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*), by showing as follows:

- (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
- (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

The labor certification application filed by Employer lists the title of the offered job as Preschool Teacher (AF 44, item 9) while the duties of the job described in item 13 of the application are those of a Nursery School Attendant. Employer contends that the requirements of a B.S. Degree and three years experience are not unduly restrictive for a teacher and even if they were, a business necessity exists for the degree requirement because Federal law requires that Preschool Teachers have at least 15 college credits.

We agree with the CO that it is the description of the job duties and not the job title that defines the position being offered. *Richard Lum*, 94-INA-219 (June 27, 1995); *Hardee's*, 94-INA-218 (June 27, 1995). In this case, the Employer's described job duties are identical to those of the Nursery School Attendant's job described in the DOT. (359.677-018). Therefore, we find that the offered job is for a Nursery School Attendant and not a Teacher. The standard vocational preparation (SVP) for a Nursery School Attendant's position is three to six months of combined experience, education, and training. Accordingly, Employer's job requirements of a B.S. degree and three years of experience are unduly restrictive.

Employer's explanation of why these job requirements are necessary is inadequate to establish business necessity. The 15 college credits required by law can be obtained in one semester of college work. This could be accomplished within six month, which complies with the SVP for a Nursery School Attendant. The fact that Employer internally decided to require a B.S. degree does not establish a business necessity for the requirement. Moreover, no creditable explanation has been offered to justify the three year experience requirement. In sum Employer has not demonstrated that the job requirements bear a reasonable relationship to the occupation of Nursery School Attendant or are essential to perform the described job duties in a reasonable manner. Certification was properly denied.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

---

RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.